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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTOINE JAQUES MONROE and  
CEDRIC LYNELL TAYLOR,

Defendants and Appellants.

B287107, B289122

(Los Angeles County  
Super. Ct. No. TA143326)

CONSOLIDATED APPEALS from judgments of the Superior Court of Los Angeles County, Michael Schultz, Judge. Affirmed.

Boyce & Schaefer and Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant Antoine Jaques Monroe.

Houlé Law, Lisa Houlé; William Ayers; and Jeffrey Lewis for Defendant and Appellant Cedric Lynell Taylor.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendants and appellants Antoine Jaques Monroe and Cedric Lynell Taylor were charged with murder (Pen. Code, § 187, subd. (a))<sup>1</sup> and conspiracy to commit murder (§ 182, subd. (a)(1)). It was further alleged Monroe was armed with, and discharged, a handgun in the commission of the killing (§§ 12022, subd. (a)(1), 12022.53, subds. (b)-(d)). The jury convicted Monroe on both counts and found true the section 12022.53 firearm allegations. The jury found Taylor guilty of conspiracy, but acquitted him of murder.

Monroe challenges the sufficiency of the evidence to support both convictions and argues his trial counsel was ineffective for failing to object to the testimony of one of the three witnesses who identified him.

Taylor asserts his conviction for conspiracy to commit murder must be reversed because (1) the trial court failed to instruct the jury sua sponte with CALCRIM No. 418, concerning hearsay statements by codefendants; (2) his acquittal of murder is inconsistent with the conspiracy conviction; (3) there was no substantial evidence he entered into an agreement to murder the victim; and (4) he received ineffective assistance of trial counsel.

In supplemental briefing, both appellants raise for the first time a constitutional challenge to the court security assessments (§ 1465.8, subd. (a), criminal conviction assessments (Gov. Code, § 70373), and restitution fine (§ 1202.4).

We find no merit in appellants' contentions and affirm both judgments.<sup>2</sup>

## FACTUAL AND PROCEDURAL SUMMARY

Desley Gray, nicknamed "Speedy," moved from New York to Los Angeles in 2009 or 2010. He lived with his cousin, Carlton Young, and Young's girlfriend, Cherril Goodman, after his arrival. Gray introduced

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

<sup>2</sup> Each appellant timely appealed. We granted the Attorney General's motion to consolidate the two appeals for the purposes of briefing, oral argument, and decision.

Young and Goodman to Monroe, whom Gray referred to as “Dog.” Monroe drove a gold Cadillac Escalade.

Goodman saw Gray “a lot.” Gray was with Monroe at “quite a few locations” and in Monroe’s vehicle “a few times.” Monroe came to Goodman’s home “maybe three times.” Young saw Monroe and Gray together six to eight times.

On April 26, 2010, a phone later traced to Taylor was used to send a succession of threatening text messages to Gray: “We’re gonna blow your head off [expletive], you all dead”; “Get the [expletive] out of Cali, all you all. You a dead man, [expletive]”; “You [expletive] the wrong [expletive], boy, you better go the [expletive] back to New York”; “[Expletive], you sleep in the car [expletive]”; and, “I need to help you [expletive].”

The following day, April 27, 2010, Gray received another text from the same number: “You [expletive] dummy. You was only worth 3500. You got to be [expletive] dumb, you [expletive]. You don’t know what kicked off. Be ready because you going to die period.”

Also on April 27, Gray, Young, and Goodman went together to Isis Auto Sales to buy cars. Goodman testified Gray received several calls on his cell phone and argued with the caller—yelling, pacing back and forth, and gesturing with his free hand. Gray tried to ignore subsequent calls so he could test drive a car, but the calls persisted. Gray bought a car that day. While still at the dealership, Young saw Monroe drive away and said, “Speedy, there go your friend right there, Dog.”

Records revealed that over the next two days, 22 calls were made between the cell phone Taylor used and a phone number connected to Monroe. There were 13 calls between Monroe’s number and Gray’s cell phone, and 10 calls from Taylor’s phone to an unidentified fourth telephone number.<sup>3</sup>

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<sup>3</sup> Detectives were unable to determine who used the fourth telephone number. Records produced pursuant to a search warrant indicated the number was associated with a prepaid account that did not include any identifying customer information.

At 5:30 a.m. on April 29, 2010, Gray received a text message from the same unidentified number: “You really don’t, don’t give a [expletive] about nobody but you. But you leave your people for dead. You’re a cold [expletive]. Somebody is going to pay—somebody is going to pay and won’t be me. What goes around comes back to you. I hope you took care of your people. No rules.”

Later in the morning on April 29, Gray returned to the dealership and waited three or four hours while mechanic Victor Santoyo worked on his car. Gray spoke on his cell phone most of the time, pacing back and forth.

Santoyo heard someone walk into the service area at about 1:30 p.m. He looked up and saw a tall, slender African-American man with short hair wearing a black hooded sweatshirt and shorts. Seconds later Santoyo heard two gunshots and saw the same man, later identified as Monroe, flee toward the drive-through restaurant next door. Santoyo saw the man turn back to look at Gray, who lay on the ground. Gray had been shot in the face.<sup>4</sup>

Byron Travillion was in the drive-through lane next door when he heard gunshots. He looked up as a man ran right in front of his truck from the direction of the car dealership before getting into a black Honda with a woman driving. Travillion thought the man was holding a weapon.

Los Angeles Police Department Detective Andrew Moody obtained surveillance video from the drive-through restaurant. He showed witness Santoyo still photographs from the video; Santoyo identified the man running in front of the truck as the shooter. Santoyo was unable to identify Monroe from a “six-pack” photographic lineup.

The detective showed Travillion the same still photographs and six-pack. Travillion told the detective Monroe’s photograph “look[ed] like that’s the guy” who ran in front of his truck immediately after the gunshots.<sup>5</sup>

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<sup>4</sup> Gray remained in a coma for more than two years. He died on August 11, 2012, from the injuries inflicted in the 2010 shooting.

<sup>5</sup> Travillion did not want to testify at trial. After Travillion failed to appear, he was taken into custody to secure his appearance. The jury heard Travillion’s recorded 2010 statement.

Detective Moody also interviewed Young shortly after Gray's murder. Young saw Monroe a few days before the shooting. A portion of Young's 2010 police interview was played for the jury.<sup>6</sup> At that time, after viewing the still images from the surveillance video, Young initially told the detective it was hard to tell, but said the photo "looks like Dog," citing the complexion on the man in the photo. The detective played the video for Young as well. After viewing the video, Young said, "[t]hat look just like him." "That looks just like Dog." When the detective asked Young if the man running in the video was "definitely" Monroe, Young nodded his head in agreement and twice stated, "No doubt."

Detective Moody recovered the victim's cell phone from the scene of the shooting. He obtained cell phone records for Gray's phone number as well as the phone numbers used to send the threatening texts and to make the repeated calls. All the threatening texts, except the last one, were sent from a phone number issued to an account belonging to Taylor's sister, Zulodius Morgan. Morgan told Detective Moody the account was in her name, but her brother used the phone with the referenced phone number. That phone number was in Morgan's contact list under "Cedric," Taylor's first name. No other phone number in Morgan's phone was associated with Taylor's name.<sup>7</sup> Further investigation established Taylor's phone was near the car dealership when the victim was shot and gone from the area shortly after the shooting.

Monroe's Escalade was registered in his name to an address that was also the billing address for one of the phone numbers involved in a flurry of calls to and from Taylor's phone. Monroe was in possession of the phone with that number when Detective Moody interviewed him. The contact list on Monroe's phone listed "Antoine" next to the phone's number.

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<sup>6</sup> Like Travillion, Young did not want to testify. He was arrested in New York and brought to Los Angeles for trial.

<sup>7</sup> Moody interviewed Morgan in July 2010. At trial, Morgan testified she told the truth during the interview, but otherwise denied, or claimed she did not recall, her prior statements. A recording of a portion of Morgan's interview was played for the jury.

Monroe presented no evidence in his defense. Taylor presented three character witnesses who testified he was not violent.

Monroe was convicted of both counts. The jury found Taylor guilty of conspiracy to commit murder, but acquitted him of the murder itself.

Monroe was sentenced on December 21, 2017. On the murder conviction, the trial court sentenced him to “[l]ife in prison with a minimum parole eligibility of 25 years.” The trial court imposed a like term for the conspiracy conviction, but ordered it stayed. (§ 654.) A consecutive life term, with minimum parole eligibility in 25 years, was imposed for the firearm enhancement. The trial judge discussed the newly enacted section 12022.53, subdivision (h), that would become effective within two weeks of the sentencing hearing. Recognizing he would have the discretion to strike the firearm enhancement in the interest of justice, the trial judge advised that “under no circumstances” would he do so, noting Monroe “planned and executed the victim.” Monroe was ordered to pay a \$10,000 restitution fine (§ 1202.4, subd. (b)(1)), two court security assessments, and two criminal conviction assessments (§ 1465.8; Gov. Code, § 70373).

Taylor’s sentencing hearing was continued to March 28, 2018. The trial court sentenced him to life in prison, with minimum parole eligibility after 25 years. Taylor also was ordered to pay a \$10,000 restitution fine, one court security assessment, and one criminal conviction assessment.

## DISCUSSION

### A. Monroe’s Appeal

#### 1. *Sufficiency of the Identity Evidence*

Monroe challenges the sufficiency of the evidence to support his murder conviction, arguing the out-of-court identifications were equivocal, there were no in-court identifications, the phone evidence was ambiguous, and the quality of the surveillance video was so poor that identification based on it alone was impossible. Citing *Jackson v. Virginia* (1979) 443 U.S. 307, Monroe adds the prosecution’s failure to carry its burden of proof violated his constitutional right to due process. We disagree.

“On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude

that the prosecution sustained its burden of proof beyond a reasonable doubt.” (*People v. Boyer* (2006) 38 Cal.4th 412, 479 (*Boyer*).) Evidence that meets this standard also satisfies constitutional due process requirements. (*Id.* at p. 480.) Although we assess whether the evidence is inherently credible and of solid value, we also view the evidence in the light most favorable to the jury verdict and presume the existence of every fact the jury could reasonably have deduced from that evidence. (*Ibid.*) A single eyewitness’s identification may be sufficient to establish beyond a reasonable doubt that the defendant committed the charged crime. (*Ibid.*)

Citing *People v. Cuevas* (1995) 12 Cal.4th 252 (*Cuevas*), Monroe asserts the identifications by Travillion and Young were not solid or credible. Although Travillion and Young were reluctant witnesses at the 2017 trial, and their memories were not so definite at that time, both identified Monroe in 2010 interviews. Travillion, who did not know Monroe, and Young, who did know him, identified appellant as the man in the surveillance video. The challenged out-of-court identifications were sufficient. (*Boyer, supra*, 38 Cal.4th at p. 480 [“an out-of-court identification generally has *greater* probative value than an in-court identification, even when the identifying witness does not confirm the out-of-court identification” because the suggestions of others and the circumstances of trial may influence a witness’s courtroom identification].)<sup>8</sup>

The quality of the surveillance video was such that the trial judge, when he denied Monroe’s section 1118.1 motion for acquittal at the close of evidence and Monroe’s motion for new trial (§ 1181), remarked the “resemblance” between Monroe at trial and the image in the surveillance video was “striking.” Additionally, the jurors were not limited to lay witness

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<sup>8</sup> Even if the Travillion and Young identifications were excluded, sufficient evidence, in the form of Santoyo’s testimony, supported Monroe’s convictions. In 2010, shortly after the shooting, Santoyo provided a description of the shooter and, in a police interview, confirmed the running man in the surveillance video was the same man who walked into the car dealership, shot Gray without saying a word, and then fled toward the drive-through restaurant. Santoyo’s trial testimony was consistent. The jury was properly instructed concerning eyewitness identifications. (CALCRIM No. 315.)

opinion. The jury saw the surveillance video during the evidentiary portion of the trial, and it was available during deliberations. The still photographs from the video as well as the six-pack were also trial exhibits.

Phone records established the frequency of the Taylor/Monroe, Taylor/Gray, and Monroe/Gray communications from the first threatening text message through the shooting. A reasonable inference from Morgan's testimony was that Taylor used the phone that sent and received communications to his number. When interviewed by police, Monroe was in possession of the cell phone that communicated with Taylor and the victim. In sum, substantial evidence supports Monroe's conviction. (*Cuevas, supra*, 12 Cal.4th at p. 261 ["The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on "isolated bits of evidence""].)

## 2. *Monroe's Ineffective Assistance Claim*

Monroe also contends trial counsel was ineffective for failing to object to Young's identification of Monroe as the man in the surveillance video, arguing the witness's testimony would have been excluded had his attorney done so. Again, we disagree.

To prevail on this claim, Monroe must demonstrate his counsel's performance fell below an objective standard of reasonableness and, but for the deficient performance, it is reasonably probable that the result would have been different. (*People v. Jones* (2010) 186 Cal.App.4th 216, 234-235 (*Jones*).) Monroe acknowledges the line of appellate "decisions [that] have long upheld admission of [lay] testimony identifying defendants in surveillance footage or photographs." (*People v. Leon* (2015) 61 Cal.4th 569, 601). Monroe argues, however, those decisions are distinguishable because Young's familiarity with Monroe was too casual, as he only knew appellant as a friend of Gray and had seen him "six, seven, eight times, not too much." This argument goes to the weight of Young's testimony, not its admissibility. Monroe's trial counsel was not ineffective for failing to object to the

admissibility of Young’s opinion testimony that Monroe was the man depicted in the surveillance video.<sup>9</sup>

### 3. *Sufficiency of the Evidence of Conspiracy to Commit Murder*

Monroe and Taylor both challenge the sufficiency of the evidence to support the criminal conspiracy conviction.<sup>10</sup> Monroe argues there was no evidence of what, if anything, he and Taylor agreed to do based on the cell phone communications between them and the victim. Monroe complains the phone number was only “loosely connected” to him and contends the fact the shooter left the scene in a car driven by someone else suggests criminal involvement by others. Taylor decries the absence of any direct evidence connecting him to an agreement to kill Gray. While he acknowledges a jury is entitled to draw reasonable inferences from circumstantial evidence, he asserts the showing here was no more than “conjecture, guess work or wishful thinking.”

“Conspiracy to commit murder requires an agreement to commit murder and an overt act by one or more of the conspirators.” (*People v. Juarez* (2016) 62 Cal.4th 1164, 1169.) Conspiracy also requires two specific intent elements, i.e., the intent to agree or conspire and the intent to commit the offense that is the object of the conspiracy. (*People v. Swain* (1996) 12 Cal.4th 593, 600.) A conspiracy may be, and usually is, proven by circumstantial evidence, including “the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy.” (*People v. Penunuri* (2018) 5 Cal.5th 126, 144-145.)

Here, an agreement to murder the victim was established by the rush of communications between Monroe and Taylor, Taylor and the victim, and Monroe and the victim. The graphic, threatening texts from Taylor to the victim (e.g., “You a dead man” who “[expletive] the wrong [expletive]”) began three days before the victim was shot and suggested a dispute over money.

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<sup>9</sup> In any event, Monroe has not explained how the admission of Young’s testimony was prejudicial, given that Travillion identified Monroe as the runner leaving the car dealership and Santoyo identified the runner as the shooter.

<sup>10</sup> We discuss their contentions on this issue together.

Within the 36 hours of the shooting, phone records confirmed 22 calls between Taylor and Monroe, 13 calls between Monroe and the victim, and 10 calls between Taylor and an unidentified person/number, who also sent the victim a text stating, “somebody is going to pay” and “[w]hat goes around comes back to you.” (See, e.g., *People v. Thompson* (2016) 1 Cal.5th 1043, 1109-1110 [evidence of numerous calls between the defendant and second man in weeks preceding murder “suggests an ongoing enterprise between them”].)

Overt acts by Monroe, as found by the jury, included his obtaining a loaded semiautomatic firearm, stalking the victim to the car dealership, and shooting him in a public location without saying a word before escaping in a waiting car with a getaway driver. For his part, Taylor’s cell phone indicated he was nearby when the shooting occurred and left the area afterward. Together, this evidence was sufficient to prove Monroe and Taylor conspired to murder Gray. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1024-1025 [circumstantial evidence may support a conspiracy conviction, “particularly when those circumstances are the defendant’s carrying out the agreed-upon crime”]; *Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 57-58 [conspiracy is typically “inferred . . . from . . . facts and circumstances which, when taken together, apparently indicate that they are parts to the same complete whole”].)

Taylor suggests other, contradictory, reasonable inferences may be gleaned from the circumstantial evidence. But “[w]e presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Relying on *United States v. Espinoza-Valdez* (9th Cir. 2018) 889 F.3d 654, 657, Monroe maintains the circumstantial evidence established only “[m]ere association and activity with a conspirator,” not his participation in a conspiracy. In *Espinoza-Valdez*, the defendant was convicted of conspiracy to

import and distribute marijuana. Although Espinoza-Valdez was arrested with two unidentified individuals in an area where “scouts” operated to protect marijuana smuggling, the Ninth Circuit concluded the evidence was insufficient to support a conspiracy conviction: “The government’s case rested almost exclusively on the expert testimony regarding drug traffickers’ use of scouts to facilitate the transportation of marijuana through the . . . area. The government presented no evidence of drugs that actually passed through or were intended to pass through that area under Espinoza-Valdez’s watch. Nor did the government present evidence of any specific individuals with whom Espinoza-Valdez allegedly conspired. There simply is no evidence as to what (if anything) was specifically agreed to, who agreed to it, or what any agreement was intended to accomplish.” (*Id.* at p. 658.)

*Espinoza-Valdez* is readily distinguishable. Monroe entered the car dealership moments before the victim was shot and fled after one witness heard gunshots and saw the bleeding victim on the ground. Taylor was identified as Monroe’s co-conspirator. In addition to the frequent communications between Monroe and Taylor, phone records established that before the shooting, threatening texts were sent to Gray from Taylor’s phone and Monroe made numerous calls to Gray. Cell tower records placed Taylor’s phone near the car dealership when the shooting occurred. This evidence is sufficient to support the conspiracy conviction for both appellants.

## **B. Taylor’s Appeal**

In addition to the claim that the conspiracy conviction was not supported by substantial evidence, Taylor claims reversal is compelled based on instructional error, inconsistent verdicts, and ineffective assistance of counsel.

### **1. *Instructional Error***

Taylor faults the trial court for not instructing the jury, *sua sponte*, with CALCRIM No. 418. He asserts this instruction concerning hearsay statements by codefendants was required once the prosecutor introduced the single threatening text message sent to Gray from the unidentified phone number. Taylor forfeited the issue, however, by failing to cite any authority or present a cogent argument to support his claim.

CALCRIM No. 418 is tied to Evidence Code section 1223 and must be given when a “coconspirator[’s] statement has been admitted under Evidence Code section 1223,” the coconspirator exception to the hearsay rule. (Bench Notes to CALCRIM No. 418 (2016) p. 200; see also *People v. Jeffery* (1995) 37 Cal.App.4th 209, 215; *People v. Herrera* (2000) 83 Cal.App.4th 46, 63.) Nothing in the record suggests this text message was admitted under the coconspirator exception to the hearsay rule. Even Taylor agrees the text message “was introduced to prove the existence of multiple persons in a conspiracy to murder Gray.” This is a nonhearsay purpose. (*People v. Noguera* (1992) 4 Cal.4th 599, 624-625 [statements offered “to establish the existence of a conspiracy” are not hearsay]; see also *People v. Curtis* (1951) 106 Cal.App.2d 321, 326 [“An act, declaration, or omission of an alleged conspirator which forms a part of the transaction which is in dispute—the agreement coupled with an overt act—is not hearsay and is admissible in evidence”].) Evidence Code section 1223 was not implicated, and the trial court was not under a sua sponte duty to instruct with CALCRIM No. 418.<sup>11</sup>

## 2. *Inconsistent Verdicts*

In convicting Monroe and Taylor of conspiracy to commit murder, the jury necessarily found one or both of them committed at least one overt act designed to kill the victim. In acquitting Taylor of murder, the jury necessarily found the prosecution did not prove Taylor acted with malice *and* committed an act that caused Gray’s death *or* that he aided and abetted Monroe in killing the victim. Citing *Oliver v. Superior Court* (1928) 92 Cal.App. 94 and *People v. Robinson* (1954) 43 Cal.2d 132 (*Robinson*) (discussing and distinguishing *Oliver*), Taylor contends his acquittal of

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<sup>11</sup> The trial court did give CALCRIM No. 373, which told the jurors not to speculate whether individuals other than appellants were part of a conspiracy to murder Gray: “The evidence shows that other persons may have been involved in the commission of the crimes charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether those other persons have been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crime[s] charged.”

murder forecloses any criminal liability for conspiracy to commit murder. He is mistaken.

*Robinson* described the rule as follows: “It is only when the substantive offense charged is alleged to be the only overt act in furtherance of the conspiracy that an acquittal of the substantive offense operates as an acquittal of the conspiracy count based solely thereon. . . . (*Oliver v. Superior Court*, 92 Cal.App. 94, 96-97; accord *In re Johnston*, 3 Cal.2d 32, 35-36.) But where there are overt acts alleged in the conspiracy count in addition to those constituting the substantive offense, there may be a conviction of conspiracy and an acquittal of the substantive offense. Such a conviction and acquittal have been held not to be inconsistent.” (*Robinson, supra*, 43 Cal.2d at p. 138.)

The jury in this case was instructed with CALCRIM No. 563 and advised that conspiracy-to-commit-murder convictions required the prosecution to prove that Monroe and Taylor or one of them “committed at least one . . . overt act[] alleged to accomplish the killing.” The actual shooting of Gray was alleged to be an overt act. But it was not the only alleged overt act. The other two were that “[a] co-conspirator gained possession of a loaded, .40 caliber semi-automatic handgun [and] . . . [¶] [a] co-conspirator located Desley Gray at Isis Auto Sales in Los Angeles.”<sup>12</sup>

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<sup>12</sup> CALCRIM No. 563 added that “[s]omeone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy” and “[e]vidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy.”

The jury was also instructed with CALCRIM No. 420, which provided in part, as to Taylor only, that he was “not guilty of conspiracy to commit murder if he withdrew from the alleged conspiracy before any overt act was committed.”

Before deliberations, the trial court struck two additional alleged overt acts (that a coconspirator sent threatening text messages to Gray, quoting text from the first message sent from Taylor’s phone and the last text message sent by an unidentified person as described above).

(§ 182.) Because overt acts other than the killing itself were alleged, Taylor’s acquittal of murder “does not negative in any way the alleged and undoubtedly proved overt acts” committed by him and/or Monroe. (*People v. McNamara* (1951) 103 Cal.App.2d 729, 737; see also § 954 “[a]n acquittal of one or more count[] shall not be deemed an acquittal of any other count”).)

### 3. *Taylor’s Ineffective Assistance Claim*<sup>13</sup>

Taylor contends his counsel was ineffective because (1) he did not move to sever his trial from Monroe’s; (2) he did not call his own cell phone expert to explain the limitations of the technology used to locate a cell phone through cell phone towers and “pinging,” and; (3) he did not seek pretrial discovery of Detective Moody’s personnel file pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); and Taylor cites no authority to support the first two contentions, and we do not consider them. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Hardy* (1992) 2 Cal.4th 86, 150.)

In any event, as to all three contentions, ““the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged.”” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) The Supreme Court has “repeatedly stressed . . . [that a] claim of ineffective assistance in such a case [must be rejected on appeal, as it] is more appropriately decided in a habeas corpus proceeding.” (*Id.* at pp. 266-267.) So it must be here.

## C. **Imposition of Assessments and Restitution Fines**

Convicted of two felonies with a firearm enhancement, Monroe was sentenced to prison for a term of 50 years to life. The trial court also imposed two \$40 court security assessments (§ 1465.8, subd. (a)), two \$30 criminal conviction assessments (Gov. Code, § 70373), and the maximum \$10,000

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<sup>13</sup> As noted in connection with Monroe’s appeal, a defendant asserting ineffectiveness of trial counsel must demonstrate (1) his counsel’s performance fell below an objective standard of reasonableness; and (2) but for his counsel’s deficient performance, there is a reasonable probability the result would have been different. (*Jones, supra*, 186 Cal.App.4th at pp. 234-235.)

restitution fine (§ 1202.4, subd. (b)(1)).<sup>14</sup> Convicted of one felony, Taylor was sentenced to 25 years to life. The trial court imposed one \$40 court security assessment, one \$30 criminal conviction assessment, and the maximum \$10,000 restitution fine. Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), which was filed several days before oral argument in these appeals, appellants claim imposition of the assessments and restitution fines violated their due process rights under the state and federal Constitutions.<sup>15</sup> In a supplemental brief in which Taylor joins, Monroe asks this court to reverse the assessments and stay his obligation to pay the restitution fine until the People prove he has the ability to pay it.

Neither appellant objected in the trial court based on an inability to pay. They contend the assessment and restitution fine issues present only a question of law that may be raised for the first time on appeal. In any event, they add, an objection in the trial court would have been futile because “*Dueñas* states a newly declared constitutional rule.” The Attorney General argues appellants have forfeited the issue. Our colleagues in Division Eight

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<sup>14</sup> Section 1202.4, subdivision (b)(2) authorizes a trial court to “determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.” This formula yielded a number far in excess of the maximum allowable restitution fine.

<sup>15</sup> *Dueñas, supra*, 30 Cal.App.5th 1157 involved an indigent, homeless mother of two young children who subsisted on public aid. Her driver’s license had been suspended because she was unable to pay citations she received as a juvenile. (*Id.* at p. 1161.) As an adult, she had a number of misdemeanor convictions for driving without a license. Each misdemeanor conviction resulted in jail time in lieu of fines she could not pay and included assessments that further indebted her to the court system and prevented her from reclaiming her driver’s license. (*Ibid.*) *Dueñas’s* poverty and the minor nature of her offenses were established in the trial court, but the mandatory assessments and restitution fine were nonetheless imposed. Finding *Dueñas’s* poverty to be “the only reason” she could not pay the misdemeanor court assessments and minimum restitution fine (*id.* at p. 1160), the Court of Appeal reversed.

of this Appellate District recently found forfeiture based on facts similar to those in this case, and we agree with their analysis and holding. (*People v. Frandsen* (Apr. 4, 2019, B280329) \_\_ Cal.App.5th \_\_ [2019 Cal.App. LEXIS 309] (*Frandsen*).)

Frandsen, convicted of two felonies and sentenced to prison for a term of 19 years to life, was ordered to pay court security and court operations assessments and a maximum restitution fine. (*Frandsen, supra*, \_\_ Cal.App.5th at p. \*22.) Like appellants, Frandsen did not object in the trial court that he lacked the ability to pay the assessments or the restitution fine. He, too, asserted the issue was one of law that could be raised for the first time on appeal and argued *Dueñas, supra*, 30 Cal.App.5th 1157 announced “a dramatic and unforeseen change in the law” (*Frandsen*, at p. \*50) that rendered any objection futile. *Frandsen* rejected both contentions.

Whether either appellant has the ability to pay the assessments and the restitution fine clearly presents a fact issue. Appellants were required to object in the trial court in order to preserve this issue for appeal. Nor can appellants avoid forfeiture by claiming an objection would have been futile. Section 1202.4, subdivision (d) expressly requires the trial court to consider a criminal defendant’s inability to pay a restitution fine in excess of the statutory minimum and places the burden of proof on the defendant to do so. An objection on this basis “would not have been futile under governing law at the time of his sentencing hearing.” (*Frandsen, supra*, \_\_ Cal.App.5th at p. \*51.)

Even without forfeiture, we would find no merit in appellants’ assertions that they are unable to pay the assessments or restitution fines. That they were represented in the trial court and on appeal by appointed counsel does not demonstrate an inability to pay the assessments or the restitution fine, now or in the future. This is particularly so as each appellant was sentenced to a lengthy prison term.

We presume, as did the trial court, that appellants are eligible to earn prison wages. (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1487 [trial “court may consider the future financial prospects of a defendant” sentenced to prison who will earn prison wages]; *People v. DeFrance* (2008) 167 Cal.App.4th 486, 505 [the many years it may take to pay a restitution fine

based on the prison wage scale do not demonstrate “an absolute inability to ever pay the fine”]; see also § 1202.4, subd. (d) [the defendant’s burden to demonstrate an inability to pay includes establishing a lack of future earning capacity].) In this regard, *People v. Potts* (2019) 6 Cal.5th 1012 is instructive. There, the trial court ordered the defendant, who had been sentenced to death, to pay a \$10,000 restitution fine, erroneously assuming the defendant would be eligible to work in prison. The Supreme Court found the error harmless and disagreed with the defendant’s “suggest[ion] that a fine is automatically invalid if a defendant is unable to pay it. . . . Inability to pay is a factor for the court to consider in setting the amount of a restitution fine . . . . The court was permitted to conclude that the monetary burden the restitution fine imposed on defendant was outweighed by other considerations.” (*Id.* at pp. 1056-1057.)

Finally, given appellants’ “failure to object to a \$10,000 restitution fine based on inability to pay, [they have] not shown a basis to vacate assessments . . . for inability to pay.” (*Frandsen, supra*, \_\_ Cal.App.5th at p. \*52.)

## **DISPOSITION**

The judgments are affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

DUNNING, J.\*

We concur:

MANELLA, P. J.

WILLHITE, J.

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\* Retired Judge of the Orange Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.